IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 4, 2007 Session

GARY W. FRYE, ET AL. v. CARL PRESLEY, ET AL.

Appeal from the Chancery Court for Monroe County
No. 14,551 Jerri S. Bryant, Chancellor

No. E2007-00510-COA-R3-CV - FILED JUNE 27, 2008

This case involves a dispute between the owners of adjoining properties over the use of a driveway. The dispute focuses on the easement rights of the defendants, if any, to a right-of-way across the north edge of the plaintiffs' property and a portion of the west edge. The court, following a bench trial, made findings regarding the subject driveway. The defendants appeal. We affirm in part and reverse in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Reversed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J. joined.

John W. Cleveland, Sweetwater, Tennessee, for the appellants, Carl Presley, Willie Presley, Ronald K. Roach, Debra C. Roach, Gilbert J. Raby, Justin Carl Raby, Steven L. Presley, and Connie N. Presley.

W. Levi Frye, Knoxville, Tennessee, for the appellees, Gary W. Frye and Kathy U. Frye.

OPINION

I.

Gary W. Frye and Kathy U. Frye ("the plaintiffs" or "the Fryes") instituted this action to clarify what rights, if any, are possessed by their neighbors, Carl Presley and Willie Presley ("the Presleys"), their children, and grandchildren (the Presleys and their descendants will be collectively referred to as "the defendants"), in a driveway that runs along the northern boundary and a portion of the west boundary of the plaintiffs' property. The driveway provides the defendants access to Chestnut Street, a public way in the city of Sweetwater. The defendants are the owners of property located to the west of the plaintiffs' property. They assert that they have a prescriptive easement allowing them to continue using the entirety of the driveway at issue. The plaintiffs, on the other

hand, claim that the defendants have unreasonably encroached upon and increased the burden on the plaintiffs' property. To assist the reader, a copy of a survey prepared for the plaintiffs is attached as an appendix to this opinion. We have added the words "Frye Property" to the survey to indicate the plaintiffs' tract.

The Fryes asserted in their complaint that the alleged easement "does not appear in the title of plaintiffs nor in the title of defendants Carl and Willie Presley . . . [but] . . . is mentioned in the subsequent conveyances by Carl and Willie Presley to their children, which plaintiffs aver is insufficient to create this restriction on plaintiffs' property." They further contended that if the trial court found the alleged easement along the northern boundary to be "lawfully present, the defendants have greatly increased the scope of their claimed easement . . . ." As to the continuation of the driveway along a portion of the plaintiffs' western boundary line, the Fryes alleged that "Carl and Willie Presley have created other rights of way touching on the property of plaintiffs . . . [and] . . . [i]n their use of the same, they have encroached upon the lands of plaintiffs . . . ." The plaintiffs additionally asserted that the defendants had unlawfully installed utility lines on their property. They asked the trial court to "determine whether defendants in fact possess a lawful easement across the [northern edge of the] property of plaintiffs . . . [and to] order the defendants to remove their drive at the west end of plaintiffs['] property to their own lands and cease use of plaintiffs' property for a road . . . ."

Following a bench trial, the court held, in part, as follows:

> There is a legitimate question about the existence and size of an easement. The Frye deed says subject to any visible easements. Here, this was visible, it was on the ground, it had been driven on for years. I'm finding clear and convincing evidence of an easement along the north side of the Frye property beginning at the McCamus slash Walker line.[1] The question is, how wide [is] that right-of-way?
>
> I have no proof in the record today as to what is physically on the ground as far as the number of feet are concerned, but that it has, as the Presleys have graded this easement, increased in width by as much as one foot or two feet. But I do have at least two surveys that have this easement drawn in on them indicating that there was something on the ground in the nature of 14 feet.
>
> Mr. Presley has placed a 14-feet number in a deed signed by him and the court, without Mr. Presley being able to prove otherwise, presumes that that deed was made at his request, and I certainly think that it is reasonable. And from the proof in this case, I can find that

[1] In the trial court's final order – see page four of this opinion – the same line is referred to as the "Walker/*McAmis* line." (Emphasis added.)

> that easement at that point from Chestnut Road to the north west corner of the Frye property is 14 feet in width.
>
> The parties are enjoined, the defendants, from coming on the Frye property in excess of 14 feet in width. That will be surveyed, the pins will be placed, a restraining order will go down prohibiting any party from moving those pins. That deals with that portion of the right-of-way.
>
> The 30-foot, as we have described in this case, right-of-way was referenced in a Presley deed to a Presley party beginning in 1993. This driveway, or right-of-way, or easement, as the words may be used interchangeably, is to be moved off of the Frye property. The utilities that were placed on the Frye property, either inside or outside of this 30-foot right-of-way, must be moved.

(Footnote added.) The plaintiffs essentially conceded at trial that the defendants did enjoy an easement across the northern boundary of the plaintiffs' land, but requested the court to define exactly "what size it is in terms of width and length, and what restrictions there may be or may not be upon [its] use as to both parties." As to the plaintiffs' contention that the portion of the driveway lying across a portion of the west or rear of the Fryes' parcel was not an easement by prescription, the trial court found in favor of the Fryes. In the final order, the trial court reiterated its prior oral findings and held as follows:

> (1) That the Defendants property owners, and each of them, enjoy a right-of-way easement across the northern boundary of Plaintiffs' land by both use for longer than twenty (20) years and explicit recognition in Plaintiffs' deed;
>
> (2) That the right-of-way easement of such Defendants is fourteen (14) feet in width along Plaintiffs' northern boundary measured from the old fence line known as the Isaac Walker/McAmis line;
>
> * * *
>
> (4) That the present roadway at the western end of Plaintiffs' lands does encroach on Plaintiffs unlawfully and should be removed;
>
> (5) To the extent Defendants['] utility lines encroach upon the lands of Plaintiffs at the western end, they likewise unlawfully encroach and shall be moved;
>
> * * *

> (7) Defendants' use of the fourteen (14) foot easement to date does not constitute an unreasonable increase of burden to the servient estate.

The defendants subsequently moved to alter or amend the judgment, arguing that "[t]he proof in this cause established by clear and convincing evidence that [the defendants] . . . and their predecessors-in-title, acting under an adverse claim of right, made continuous, uninterrupted, open, visible, and exclusive use *of all parts of their existing driveway* over [the plaintiffs'] . . . property for at least twenty years with the Fryes' knowledge and acquiescence." (Emphasis added.) The defendants asserted that "[n]either the evidence produced at the trial of this cause nor statutory or common law provide a basis to distinguish the Presleys' use of that part of their existing driveway over the back or western side of the Fryes' property from their use of the northern side of the Fryes' property." In their motion for leave to maintain the driveway, the defendants contended that the court's order denied them access to the only road to their home. The trial court denied the motion to alter or amend, but granted the request to maintain the driveway pending this appeal.

II.

The issues raised by the defendants on this appeal, taken verbatim from their brief, are as follows:

> 1. Whether the trial court erred in denying [them] the use of a portion of their easement by prescription.
>
> 2. The evidence preponderates against the Trial Court's finding that Defendants' driveway unlawfully encroaches on Plaintiffs' land.

III.

Our review of this non-jury case is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption that the trial court's factual findings are correct. Tenn. R. App. P. 13(d). We must honor this presumption unless we find that the evidence preponderates against the trial court's findings. ***Id.***; ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are accorded no such deference. ***Campbell v. Florida Steel Corp***., 919 S.W.2d 26, 35 (Tenn. 1996).

IV.

An easement is a right an owner has to some lawful use of the real property of another. ***Brew v. Van Deman***, 53 Tenn. 433, 436 (1871). Any easement in this case would be an easement appurtenant, involving two tracts of land – the dominant tenement (in this case, the defendants' property) and the servient tenement (the plaintiffs' property). The dominant tenement benefits in some way from the use of the servient tenement. *See* ***Pevear v. Hunt***, 924 S.W.2d 114, 116 (Tenn.

Ct. App. 1996). A prescriptive easement arises when a person acting under an adverse claim of right makes uninterrupted, open, visible, and exclusive use of another's property for at least twenty (20) years with the owner's knowledge and acquiescence. ***Long v. Mayberry***, 36 S.W. 1040, 1041 (Tenn. 1896).

Carl Presley testified that he was born in 1932 on land constituting the dominant estate. His grandfather owned the property and his father was raised there. During that earlier period of time – when the property was owned by an ancestor of Carl Presley – a road ran from old State Highway 68 along the east property line of the Presley ancestorial property. The road ran in front of what is now Carl Presley's house, before turning east across the north property line, of what is now the plaintiffs' property, to Chestnut Street. Mr. Presley testified the driveway that is the subject of this litigation is a portion of that old road. After a period of time during which the dominant estate was owned by a Mr. Walker and, later, Robert and Margaret Patterson, the Presleys obtained the Presley ancestorial property by deed dated October 24, 1970.

At trial, the court addressed what was purported to be a *30-foot* easement along the Presleys' eastern boundary line and the Fryes' western boundary. The proof of this easement was a reference "in a Presley deed to a Presley party beginning in 1993." That deed, from the Presleys to their son, Steven L. Presley, who is a defendant in this case, provides, in relevant part, as follows:

> LYING AND BEING in the First Civil District of Monroe County, Tennessee, lying West of Chestnut Street and being more particularly described as follows:
>
> BEGINNING a[t] a point which is located as follows: To find the Beginning point, begin with the wood fence post on the Western edge of Chestnut Street at the Northern edge of a 30-foot right-of-way, said fence post being 0.1 mile South of Oakland Road; thence from said fence post South 15.0 feet to the centerline of the right-of-way, on the Western edge of Chestnut Street; thence West 323.0 feet to a corner; thence South 41' West 319 feet to a point; thence South 65° 44' West 85.13 feet to a point and being the point of BEGINNING; thence South 78° 12' East 94.0 feet to an iron pin in the line with Patterson; thence with Patterson South 45° West 150.0 feet to an iron corner; thence North 78° 29' West 541.1 feet to an iron pin corner in the line with Steven Presley; thence with Presley North 10° 48' East 150.0 feet to an iron pin corner; thence South 78° 12' East 421 feet to the point of BEGINNING, containing 1.80 acres, more or less, and being SUBJECT to any and all easements as may exist.
>
> *There is ALSO CONVEYED herewith, for purposes of ingress to and egress from the above-described property a 30-foot right-of-way* which shall run with the land for the benefit of the Grantees herein,

> their heirs and assigns, but which shall be non-exclusive, the centerline of which right-of-way begins on the Western edge of Chestnut Street, 15 feet South of the wood fence post corner (which is located 0.1 mile South from Oakland Road); thence from said point of BEGINNING West 323.0 feet to a corner; thence along the property of Frye and Richesin South 00° 41' West 319.0 feet to a point; thence South 65° 44' West 85.13 feet to a point in the property line of the property above-described.

(Capitalization in original; emphasis added.) While the Presleys' deed to their son refers to an easement *30 feet* in width, that easement, *to the extent it crosses the plaintiffs' property*, is limited in width to the 14 feet found by the trial court. This concession is clear from the remarks of counsel for the defendants:

> MR. CLEVELAND: I'm probably trying to be too technical but the 30 feet in the deed is all on the Presley property. The driveway is – *the driveway is partly on the Presley property and partly on the Frye property*.
>
> THE COURT: "The driveway" meaning the something –
>
> MR. CLEVELAND: The existing road.
>
> THE COURT: *The existing road is outside the 30 feet?*
>
> MR. CLEVELAND: *The part that's on Frye is.*

(Emphasis added.) Simply stated, the son's easement *over the Frye's' property* is limited to a width of 14 feet. If the driveway on the ground is more than 14 feet wide, the excess over 14 feet must be located entirely on the Presleys' property.

The record clearly shows that the Presleys have been using the "existing driveway" since 1970, when they purchased their home, and there has never been any other way to get to their home. When the Fryes purchased their property by deed dated March 7, 1980, the-right-of way for the benefit of the Presleys already existed. Mr. Frye testified to his familiarity with the Presley property prior to his purchase of his land:

> Q: And when you traveled on Chestnut Street, did you have any familiarity that you [had] seen this property where you subsequently bought?
>
> A: Yes. I had seen it.

Q: Okay. And when you had seen it before, you had seen this driveway of the Presley[s'], hadn't you?

A: Yes.

Q: And when you – just before you bought the property, you had occasion to take a closer look at it, didn't you?

A: Uh-huh.

Q: And you knew that this driveway was there when you bought the property, didn't you?

A: Yes. It was much smaller, yes.

Q: And it was visible, wasn't it? It was there, you could see it?

A: Yes.

Q: And you saw it?

A: Yes.

Q: And in fact when you walked that piece of property that you subsequently bought, you saw that . . . driveway turned to the left, or the south, when it got up to Carl Presley's house, didn't you?

A: You couldn't hardly see it because it was awfully small up there at the far end. It had never been grated out like that.

Q: Did you not walk to the back end of the property before you bought it?

A: Uh-huh.

Q: When you did, you saw that the driveway went on up to Carl Presley's house, didn't you?

A: Yeah.

In cross-examination regarding a 1991 survey, Mr. Frye further testified as follows:

Q: This shows a 14-foot R slash W for right of way; is that correct?

A: Yeah. I see that.

Q: And it has some hash marks or just different lines?

A: Uh-huh.

Q: Is that – does that indicate the location of the right of way?

A: Yeah. That's [where] it's located, on this side of my property.

Q: And [it] says gravel?

A: Uh-huh.

Q: So it was gravel in '91?

A: Yeah.

Q: Was it gravel in 1980?

A: Uh-huh.

Q: Okay. And then up here where it turns south *onto Mr. Presley's property*, there's another line there, it's a curved line, isn't it?

A: Uh-huh.

Q: And it's similar to these hash marks that indicate the location of the right of way, isn't it?

A: Yeah. But it's a lot wider now than it was then.

Q: And it cuts off the corner of your property there, doesn't it?

A: Yeah.

(Emphasis added.) Thus, before the Fryes purchased their tract, Mr. Frye walked the lot, was aware of the driveway, and observed that it turned to the south toward the Presleys' house. Mr. Frye admitted that the deed to his property noted that the conveyance was "subject to all prior easement[s], rights of way, and restrictions, visible or otherwise." In Mrs. Frye's testimony on cross-examination, she stated as follows:

Q: Did you have the impression [during childhood] that it was an old road even then?

A: Yes. It was an old road. I'll agree to that.

Q: Okay. It's been there for a very long period of time?

A: To my knowledge, the road has probably [been] there a hundred years or so.

Q: Now, Mr. Walker . . . where did he live?

A: He lived in the house where Carl Presley lives.

Q: And this was the driveway where he got to that property?

A: Yes.

Q: To your recollection, going back to 1960, has there ever been any other way to get to that property?

A: No.

The testimony of the Fryes themselves supports the conclusion that the entire easement from the Presleys' house to Chestnut Street has been in use for at least 30 years. There has been repeated, regular, visible use of the driveway by the defendants sufficient to establish a 14-foot prescriptive easement for the entire length of the driveway. Accordingly, the termination by the trial court of the defendants' easement in the section of the existing driveway at the west property line of the Fryes' property was in error and is hereby reversed.

The Fryes assert that if this court finds the defendants are entitled to a prescriptive easement in the portion of the driveway at their west property line, the right-of-way should be held to be overly burdensome on the servient estate and unlawfully encroaching upon the Fryes' land. They rely upon the principle underlying the use of easements that the owner of an easement "cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." ***Adams v. Winnett***, 156 S.W.2d 353, 357 (Tenn. Ct. App. 1941).

The Presleys have deeded separate portions of the dominant estate to their son and daughter. They have also permitted one grandson to place a doublewide mobile home on their property. Accordingly, the use of the driveway has been expanded over time from originally benefitting only Mr. and Mrs. Presley to now being used by at least nine drivers, owning a combined fleet of approximately 15 vehicles including boats, trailers, and farm equipment.

Mr. Frye testified that a number of the defendants speed along the driveway and "create the nuisance of dust":

> THE WITNESS: Mr. Carl E. Presley stopped and I told him, I said, you know, Carl, I said we have a problem, a little problem here, and I said I think we can work it out, we can fix it some way or another, you know, and just thought I would get your idea on it.
>
> He said, yeah, Gary, what is it? And I said, well, it's this dust. I said for 24 years now, I said, you know, it's been a bad nuisance . . . .
>
> So I said what would you suggest we could do? And he got the squint-eye syndrome on me and said, Gary, which one is it? And I said, Carl, I said with the exception of you and your wife, I said, it's everybody and some are worse than others . . . .
>
> * * *
>
> Q: All right. Did you have any other conversations beyond that one with Mr. Presley about the dust at your residen[ce] from the 14-foot road?
>
> A: About the dust in general, no. They just intensified their speeding and gravel slinging.

It is clear to us that this testimony is related to the roadway along the *northern* section of the Frye property, not the portion of the driveway along a portion of their western boundary. The trial court concluded that the defendants' use of the easement along the northern boundary did not result in an unreasonable increase in the burden to the servient estate. The evidence does not preponderate against the trial court's determination on that issue. Furthermore, our review of the record likewise reveals *no* evidence of an increased burden along the *western* section of the easement. Accordingly, we find the plaintiffs' argument to be without merit.

The Fryes additionally assert that the driveway as it existed at the time of the filing of this suit is different in size and location from that which existed at an earlier time. Mr. Frye provided the following testimony regarding the driveway at the western side of his property:

> Q: Mr. Frye, let me ask you, first of all, what are your disagreements with Mr. Presley over the location of this drive, road, whatever you want to call it?
>
> A: On the backside of my property?

> Q: Yes.
>
> A: That he would take his tractor and grater blades and continue year after year to widen it out and to widen off the corner on the north side there of that lined fence. Against the corner that swerves around the left side of my garden, he would keep gnawing with his grater blade wider and wider every year.
>
> THE COURT: "The corner" being the corner where the alleged 30-foot easement, right of way, driveway, whatever you want to call it, intersects with the 14-foot alleged easement, right of way? Got you.

He also testified that the intersection of the east-west easement with the north-south driveway is at some points as much as 30 to 40 feet in width. Further testimony by Mr. Frye, however, revealed the following:

> Q: The straight part of the driveway across the western bound[ary] of your property hadn't been moved though, has it?
>
> A: A little bit of it on the left side there as you go up to the corner, yes. It was widened out up there.
>
> Q: You're saying on the west side between you, up close to Carl's property?
>
> A: Yeah.
>
> Q: Up close to Carl's house?
>
> A: Yeah. All of that up through there was widened.

We find that the trial court's ruling on the encroachment issue, as well as its holding on the utilities matter, was based upon the court's belief that the defendants had expanded their existing driveway easement from 14 feet to 30 feet. The evidence preponderates against this finding. The easement on the western side of the Fryes' property is limited to a width of 14 feet. As previously noted, to the extent the actual roadway is more than 14 feet, the additional width is on the Presleys' property.

The Fryes lastly contend that the conveyance of the 30-foot easement from the Presleys to their son demonstrates that the defendants have the ability to maintain the western portion of the driveway on the dominant estate rather than continue to encroach upon the Fryes' property. In reliance on our opinion in ***Allison v. Allison***, 193 S.W.2d 476 (Tenn. Ct. App. 1945), the plaintiffs assert that the actual physical location of the rear section of the driveway as it currently exists is

neither reasonable nor necessary. The plaintiffs' reliance is misplaced, however, as ***Allison*** involved an easement by implication upon severance, not a prescriptive easement. The argument by the Fryes lacks merit.

V.

In summary, we conclude that the trial court's judgment regarding the defendants' right to use and their use of the driveway along the north property line of the Fryes' property should be, and hereby is, affirmed. We reverse the trial court's judgment to the extent it finds that the 30-foot easement in the Presleys' deed to their son is an easement across the property of the Fryes except we hold that the width of the actual driveway in excess of 14 feet must be entirely located on the Presleys' property. Furthermore, we reverse the trial court's judgment holding that the defendants' use of the driveway along the eastern property line of the Presleys' property and a portion of the western property line of the Fryes' property is improper. Finally, we hold that the evidence preponderates in favor of a finding that the defendants have a prescriptive easement over the entirety of the driveway at issue in this case. Accordingly, the judgment of the trial court is affirmed in part and reversed in part. Costs on appeal are taxed to the appellees, Gary W. Frye and Kathy U. Frye. The case is remanded to the trial court for enforcement of the trial court's judgment as changed by this opinion and for the collection of costs assessed below, all pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE